

Independent
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Forum

The Unintended Consequences of the Paycheck Fairness Act

By Romina Boccia

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Independent Women's Forum
4400 Jenifer Street, NW
Suite 240
Washington, DC 20015
(202) 419-1820
www.iwf.org

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Washington, DC 20015
202-419-1820
www.iwf.org

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Executive Summary

This November, the Senate will likely vote on legislation known as the Paycheck Fairness Act, to amend the Fair Labor Standards Act of 1938¹ and the Equal Pay Act of 1963², in the name of giving women extra protection against sexism in the workplace. Proponents of the Act suggest this legislation is needed to close the wage gap between working men and women, arguing that the gap is evidence of persistent gender-based discrimination.

Yet, this assertion is misleading. Research shows that the gap arises out of a multitude of factors that reflect the individual preferences of men and women, such as occupational choice, time spent at work, and non-wage benefits, among others.

Moreover, if passed, the Paycheck Fairness Act would have widespread implications for businesses and their employees, discouraging job creation and economic growth. In particular, the Act would:

- Expose employers to far greater liability and potentially frivolous lawsuits
- Burden employers with more regulations and paperwork
- Vastly expand the role of government in employers' compensation decisions
- Discourage flexible working arrangements

Women deserve equality in the workplace. The Paycheck Fairness Act, however, sets out to solve a non-existent problem based on a flawed interpretation of a statistic. Instead of advancing women's interests, the Act would have unintended consequences which would hurt businesses, workers, and the economy, ultimately leaving women with worsened employment prospects.

Introduction

Proponents of the Paycheck Fairness Act argue that existing antidiscrimination laws have not done enough to help women fight gender-based discrimination.

Prior to World War II, it was common practice for employers to explicitly discriminate against women in hiring and wage decisions. Employers would advertise positions by asking for a specific gender, and would openly pay women less than men. During World War II, when many more women entered the workforce to replace the men who were away defending the free world from the perils of statism, the government began speaking out in favor of women's right to receive wages equal to those of men for performing the same work. Voluntary compliance was low, and legislation to end gender-based discrimination was passed several years later.

The Equal Pay Act of 1963 put an end to outright workplace discrimination against women. Signed into law by John F. Kennedy, the Act ruled it unlawful to pay women lower wages based on sex. Today, companies are still able to pay employees in the same job different amounts based on performance (quantity and quality of work), experience, education, or any factor other than sex. The Paycheck Fairness Act would change that.

The Paycheck Fairness Act was first introduced into Congress by then Senator Hillary Clinton (D-NY) in 2009. The Act was passed in the House in January 2009, and the Senate is expected to vote on it this November.

Proponents of the Paycheck Fairness Act argue that existing antidiscrimination laws have not done enough to help women fight gender-based discrimination. The evidence they cite is the infamous wage gap, showing that women today still earn only 77 cents for every dollar men earn. To give women more leverage to defend themselves against pay discrimination, the Act would amend the Fair Labor Standards Act of 1938 and the Equal Pay Act of 1963 in the following ways:

- The proposed Act would redefine the term “an establishment” which would be subject to the law more broadly so that any entity owned by the same firm within the same county is considered part of the same “establishment.”
- It would narrow the application of allowable wage differentials to only those proving a “business necessity” for which there is no alternative employment practice.
- It would include all female workers within an establishment in class-action lawsuits, unless they specifically opt out.
- The cap on punitive and compensatory damages would be lifted to what the courts deem appropriate.
- The Act would authorize subsequent regulations that require employers to collect and report pay information data on their employees' sex, race, and national origin.
- The Department of Labor would be charged with issuing guidelines regarding fair pay.

This policy paper will consider the causes of the “wage gap,” and then outline the unintended consequences that would arise from the changes in the Paycheck Fairness Act, and their potential impacts on workers, businesses, and the economy.

The Wage Gap: Evidence of Discrimination?

The term “the wage gap” refers to a U.S. Census Bureau statistic which captures the ratios of median yearly earnings among full-time, year-round male and female workers, and is typically reported in cents to the dollar. In 2009, the wage gap, as reported by the U.S. Census Bureau, was 77 percent³, or women earned only 77 cents for every dollar men earned in 2009.

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Yet, this statistic does not compare men and women who are working in the same jobs with the same background. In fact, the statistic does not account for the various critical factors that influence the wages of men and women. Among these unaccounted factors are type of occupation, number of hours worked, education and experience levels, and personal choices. Studies have consistently shown that when these factors are taken into account, the wage gap shrinks.

For example, a 2009 CONSAD Research Corporation report for the Department of Labor (DOL) conducted an extensive review of the economic research on the factors that impact the wage gap, and also conducted original statistical analysis using data from the Current Population Survey (CPS) for 2007, in an attempt to identify causes of the gender wage gap. The study came to the following conclusion:

Although additional research in this area is clearly needed, this study leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers.⁴

In 2008, the Independent Women’s Forum listed several of the same factors that the DOL research study *An Analysis of the Reasons for the Disparity in Wages between Men and Women*⁵ identified as critical to understanding the wage gap statistic:

- Women on average take more time out of the labor force and work fewer hours per week than do men.
- Women tend to avoid jobs which require intense travel and relocation.
- Men assume more high-risk jobs than women.
- Women are less likely than men to negotiate their starting salary and to ask for raises.
- Women place a higher priority on personal fulfillment than men when looking for a job.⁶

The DOL study found that “observable differences in the attributes of men and women [...] account for most of the wage gap” and according to their own statistical analysis, the remaining wage gap is between 4.8 and 7.1 percent. CONSAD adds the following disclaimer to avoid coming to premature conclusions that the remaining gap reflects only discrimination: “Research also suggests that differences not incorporated into the model due to data limitations may account for part of the remaining gap.”

Research on the statistical wage gap between men and women overwhelmingly reaches the same conclusion: The statistical wage gap between men and women arises due to a multitude of factors that are not accounted for by the U.S. Census Bureau estimate. Corrective policies in the name of the “wage gap” are misguided and based on a false premise.

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Litigation

The Paycheck Fairness Act proposes enhanced enforcement of equal pay requirements that would facilitate class action lawsuits, establish comparable worth guidelines among establishments with different conditions, and encourage frivolous lawsuits.

In particular, the Act would facilitate class action lawsuits by including all women in an affected establishment in a class action lawsuit, unless they specifically opt out. The current Equal Pay Act states that only those women who affirmatively decide to join the class action lawsuit shall be included in it. Class-action lawsuits will likely be larger under the new provision.

Also, the Paycheck Fairness Act would define more narrowly the bona fide factor that allows for different pay in the same job. Under the new regulation, showing that differences in pay are caused by factors other than sex is no longer sufficient. Rather, only wage differentials that can be proved a “business necessity” for which there is no alternative employment practice will be deemed acceptable. “Business necessity” is an ambiguous concept whose definition will be determined through litigation. In the meantime, businesses would be exposed to potential litigation anytime cost differentials exist, which would encourage salary and work arrangement standardization and discourage employers from offering employees more flexible work arrangements in return for lower take-home pay.

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The Act would also broaden the definition of an establishment to include all workplaces of one employer within a county or similar political subdivision of the State. This new definition would end pay differentials that arise to compensate employees for working under different conditions. In the case of a fast food establishment that owns several stores within a county, for example, employees performing the same work may currently earn different wages because the particular location of the stores warrants differential pay to attract employees to work in higher-cost or less pleasant areas of the county. Equal pay for equal work, under the new definition of what constitutes an establishment, would hold employers of such establishments liable for violation of the Paycheck Fairness Act.

In combination with the above mentioned legal changes, lifting the cap on punitive and compensatory damages to what is “appropriate” provides lawyers with an incentive to bring forth many, potentially frivolous, lawsuits in the hopes of winning only a few large cases. Title VII, which also prohibits compensation discrimination based on sex, among other factors, includes statutory caps on punitive and compensatory damages ranging from \$50,000 to \$300,000, depending on the size of the business. The U.S. Court of Appeals for the Second Circuit concluded that a review of the Act’s legislative history reveals that “the purpose of the cap is to deter frivolous lawsuits and protect employers from financial ruin as a result of unusually large awards.”⁷

The Paycheck Fairness Act, by removing Title VII statutory caps, will provide an incentive for increased lawsuits. This raises the liability employers face when hiring women. As a consequence, employers, fearful of the prospects of costly litigation to defend against pay-based lawsuits, may avoid hiring women. Moreover, to the extent that this law will force employers to spend more time and resources on litigation or preventing litigation, businesses will have less to spend on their core business, thus creating fewer productive jobs (outside of the legal arena).

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The Regulatory Burden and Comparable Worth

The Paycheck Fairness Act would burden businesses with more regulations and more extensive paperwork requirements in order to develop fair pay guidelines that would move us closer to implementing comparable worth policies.

The Act would require the Equal Employment Opportunity Commission to analyze pay data, and would authorize subsequent regulations that require employers to collect and report pay information data on their employees' sex, race, and national origin. The purpose of these information requirements is to facilitate the creation of Department of Labor fair pay guidelines which would encourage businesses to voluntarily establish comparable worth pay structures.

Reporting requirements would impose unnecessary administrative costs on businesses to track employees pay by sex, race, and national origin. The burden would disproportionately affect small businesses whose smaller size might mean that it is uneconomical to acquire a data processing system to deal with the new reporting requirement. Employee information would have to be tracked manually, taking away time from productive activities.

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Comparable worth proponents argue that persistent wage differences in traditionally male and female occupations, with female occupations being lower-paid, are evidence of systemic discrimination against women. A closer look at some of these occupations shows that other factors account for inter-occupation wage differences. For example, a construction company that hires mostly men for construction-related work and mostly women for administrative tasks is likely paying certain construction workers higher wages than the female administrative workers, even though the administrators might have more education. Factors accounting for the wage difference in this example would likely be specialized skill and risk. The construction worker may be compensated for risking his life in the construction zone, while the administrator performs her tasks in a more pleasant and safer office environment.

Comparable worth guidelines would rate jobs according to a set of allegedly impartial criteria—education, experience, responsibility, working conditions etc. Comparably rated jobs would pay the same wage. Yet, absent supply and demand considerations, criteria would be necessarily subjective. Those charged with making such determinations would inevitably fail to value certain occupations properly, and in the process fail to assure that the necessary incentives are in place to draw future workers into the areas where they will be most needed and in which jobs will be available, especially given the transient nature of some high-demand jobs. Harvard University professor, Greg Mankiw, gives the following example to highlight the absurdity of comparable worth rankings:

A librarian with a master's degree, ten years of experience, and a forty-hour workweek, for instance, would be paid the same as an engineer with a master's degree, ten years of experience, and a forty-hour workweek. [...] Economists also point out that comparable-worth proposals would have an important unintended side effect. Comparable-worth advocates want the wages in traditionally female occupations to be raised by legal decree. [...] when the wage is forced to rise above the equilibrium level, the quantity of labor supplied to these occupations would rise, and the quantity demanded would fall. The result would be higher unemployment in traditionally female occupations.⁸

Comparable worth guidelines which artificially raise the wages in some occupations might lead to higher unemployment in those occupations. Relatively higher wages are going to increase competition for those jobs, leaving many more interested applicants unemployed. Additionally, the higher cost of labor will give employers a greater incentive to automate some of the functions currently performed by employees. In the long-term, comparable worth policies remove the incentives for women to break out of traditionally female occupations, with higher wages no longer attracting potential candidates.

Issuing information collection requirements on employee pay by sex, race, and national origin imposes an unnecessary, costly burden on employers. Consequent fair pay guidelines issued by the Department of Labor would move us closer to implementing comparable worth policies, which could lead to a shortage of qualified candidates for high demand positions, and would create distortions in the labor market, thereby rendering our economy less efficient.

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Conclusion

The Paycheck Fairness Act currently pending in Congress proposes to give women more leverage in suing their employers for alleged pay discrimination. However, by forcing companies to spend more of their resources on defending against frivolous lawsuits and increasing employers' fears that they will face such a suit, this legislation would backfire on women, as employers create fewer jobs, and even seek ways to hire fewer women in order to reduce their exposure to lawsuits.

This Act would discourage companies from offering women more flexible work arrangements, as companies would seek to minimize any differentials between employee pay and working conditions.

Additionally, the Act would increase the regulatory burden on businesses by requiring the collection of pay information based on sex, race and national origin in order to issue Department of Labor guidelines regarding fair pay. These guidelines would move us closer to a comparable worth regime in which wages would be less reflective of supply and demand, but instead result from rigid criteria.

This Act would make our economy less dynamic and prosperous, and therefore is not in the interests of American women.

Endnotes

- 1 U.S. Department of Labor Employment Standards Administration, “The Fair Labor Standards Act of 1938, as Amended,” March 2004. Available at: http://www.osha.gov/pls/epub/wageindex.download?p_file=F15794/FairLaborStandAct.pdf.
- 2 Department of Labor Office of the Assistant Secretary for Administration and Management, “Equal Pay Act of 1963, as amended,” May 14, 1947. Available at: http://www.dol.gov/oasam/regs/statutes/equal_pay_act.htm.
- 3 U.S. Department of Commerce Economics and Statistics Administration, “Income, Poverty, and Health Insurance Coverage in the United States: 2009,” September 2010. Available at: <http://www.census.gov/prod/2010pubs/p60-238.pdf>
- 4 CONSAD Research Corporation, “An Analysis of Reasons for the Disparity in Wages Between Men and Women,” January 12, 2009. Available at: <http://consad.com/index.php?page=an-analysis-of-reasons-for-the-disparity-in-wages-between-men-and-women>.
- 5 CONSAD Research Corporation, “An Analysis of Reasons for the Disparity in Wages Between Men and Women,” September 2010. Available at: <http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf>
- 6 Independent Women’s Forum, “Get the Facts: The Wage Gap,” August 20, 2008. Available at: <http://www.iwf.org/campus/show/20604.html>.
- 7 *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. Mar. 21, 1997) (referencing 137 Cong. Rec. S15472 (1991) (statement of Sen. Dole); 137 Cong. Rec. S15478-79 (1991) (statement of Sen. Bumpers)), cited in Jane M. McFetridge, “Testimony on the Paycheck Fairness Act Before the Senate Committee on Health, Education, Labor & Pensions,” March 11, 2010. Available at: <http://help.senate.gov/imo/media/doc/mcfetridge.pdf>.
- 8 Greg Mankiw, “A Comeback for Comparable Worth.” June 5, 2007. <http://gregmankiw.blogspot.com/2007/06/comeback-for-comparable-worth.html>.

About the Author

Romina Boccia is a policy analyst at the Independent Women’s Forum (IWF). In 2009, she assisted the IWF as a Junior Fellow with the MSNBC program About Our Children, while participating in the Charles G. Koch Foundation Internship program. Romina also interned at the Cato Institute’s Center for Trade Policy Studies in 2010. Prior to immigrating to the United States in 2004, Romina spent 4 years as a social worker and instructor of First Aid/ CPR in her home country, Germany. Romina holds a bachelors of science in economics (summa cum laude) and a minor in data analysis from George Mason University (GMU), where she is currently pursuing a master’s degree in economics. Also at GMU, Romina held several leadership roles in the Economics Society and the Capoeira Club, and she was a peer tutor and writing fellow for the University Writing Center. She is the founder and CEO of a small women-owned business that provides education and performances in Afro-Brazilian cultural arts. Her main research interests are in domestic and international economic policy, regulation, immigration, and education.

About IWF

Founded in 1992, the Independent Women’s Forum is a non-partisan, 501(c)(3) non-profit educational institution. IWF focuses on issues of concern to women, men, and families. Its mission is to rebuild civil society by advancing economic liberty, personal responsibility, and political freedom. IWF fosters greater respect for limited government, equality under the law, property rights, free markets, strong families, and a powerful and effective national defense and foreign policy. IWF is home to some of the nation’s most influential scholars—women who are committed to promoting and defending economic opportunity and political freedom.

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Washington, DC 20015
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